(12)

No. 91-905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR,
Attorney General of the United States, *et al.*,
Petitioners,

v.

JENNY LISETTE FLORES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. The more than 360,000 members of the ABA come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of

the juvenile justice system. To further this interest, the ABA, in cooperation with the Institute of Judicial Administration ("IJA"), formed a Joint Commission on Juvenile Justice Standards in February 1973. The purpose of the Joint Commission was to develop a set of standards for every phase of the administration of the juvenile justice system.

More than one hundred lawyers, judges and specialists in the areas of social work, psychology, education, sociology, psychiatry, and juvenile justice contributed to the drafting and review of proposed standards. Tentative drafts were disseminated by the Joint Commission to members of the legal community, juvenile justice specialists, and organizations concerned with the juvenile justice system for review and comment. The work of the Joint Commission culminated in the publication of twenty-three volumes of standards relating to almost every aspect of the administration of juvenile justice. The House of Delegates of the ABA approved twenty of the twenty-three volumes as the official policy of the ABA in 1979, including *Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* (hereinafter "ABA Standards"). This volume includes comprehensive substantive and procedural standards governing the pre-disposition detention of accused juvenile offenders. The ABA considers pre-disposition detention of juveniles "one of the most serious problems in the administration of juvenile justice." ABA Standards at 1.

The ABA also has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of the nation's immigration laws. Consistent with these interests, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law (the "Coordinating Committee") in 1983. The Coordinating Committee is comprised of representatives of nine ABA entities with specialized expertise

(*e.g.*, immigration law and policy and administrative law).

In 1989, the Coordinating Committee focused directly on conditions in Immigration and Naturalization Service ("INS") detention facilities in south Texas, the nation's largest detention area, by sponsoring a delegation of representatives of the ABA, the State Bar of Texas and the American Immigration Lawyers Association to gather information and investigate conditions at specific facilities. Based on this investigation, the ABA delegation recommended that INS detain aliens "only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings." ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum In South Texas* 3 (July 1989).

The ABA participates as *amicus curiae* to call upon this Court to protect the policies reflected in the ABA Standards. The ABA respectfully suggests that the indefinite detention of juveniles, as permitted by the regulation at issue here without even the most rudimentary procedural safeguards, is directly contrary to fundamental concepts of due process, which are reflected in the ABA Standards as well as those of various other well-recognized child welfare organizations.

The ABA has received the consent of all parties to this case to present its views.

SUMMARY OF ARGUMENT

This case involves INS' policy of indefinitely detaining juveniles for whom alternative custodial arrangements are available and who pose no threat to the community or risk of flight. Pursuant to this policy, Jenny Flores and countless other alien juveniles have been deprived of their physical freedom in secure INS detention facilities simply because they have no adult relative or other "approved" custodian willing to come forward.

This policy, and the regulation that codifies it, plainly violate both the substantive and procedural components of the Fifth Amendment's guarantee of due process. Freedom from physical detention lies at the "core" of the liberty interests protected by the Due Process Clause. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992). Accordingly, the government may deprive an individual of that interest only if it can demonstrate that such deprivation actually serves a significant and legitimate objective. In an argument that strains all credulity, INS' only asserted justification is that indefinite incarceration in secure detention facilities promotes the welfare of juveniles. That contention is antithetical to universally-accepted juvenile justice standards, including numerous standards promulgated by the ABA—all of which embody the principle that detention *undermines* rather than serves the interests of juveniles. The incontrovertible nature of this premise confirms that Petitioners' argument is essentially one of administrative convenience: INS is simply unwilling to make individualized determinations as to what would serve the best interest of each child. As both this Court has held and the ABA Standards have recognized, however, the goal of greater administrative efficiency is insufficient to justify the indefinite deprivation of physical liberty.

Moreover, when a deprivation of a right secured by the Due Process Clause is at issue, the quantum of procedure used to enforce that deprivation must reflect the importance of the right. Although, under INS policy, juveniles are being denied their physical liberty and treated essentially as detained criminals, INS does not afford any individualized determination that such measures are either necessary or appropriate. Under the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the failure to provide an automatic hearing before a neutral decisionmaker deprives Respondents of the procedural protections mandated by the Due Process Clause. That legal conclusion is echoed in various ABA standards,

all of which reflect the policy judgment that juveniles need an automatic hearing before a neutral third party to protect against the arbitrary or wrongful deprivation of liberty.

Although the ABA Standards establish specific procedural and substantive criteria that the ABA considers prudent as a matter of public policy, the ABA does not contend that these standards are the only ones that comport with requirements of due process. Nevertheless, the ABA Standards are relevant to the constitutional analysis of the issues presented in this case. These standards were the result of the comprehensive effort of hundreds of attorneys, judges and experts to develop standards that represented a balanced resolution of the serious societal problem presented by pre-disposition detention. Moreover, the substantive and procedural standards reflected in the ABA Standards are consistent with the detention standards adopted by a number of organizations concerned with child welfare issues and promulgated by Congress and state legislators. Although 8 C.F.R. § 242.24 is not unconstitutional simply because it is inconsistent with the ABA's position, the fact that the regulation differs so radically from these carefully considered standards should be given weight by this Court in its constitutional analysis.

ARGUMENT

I. THE INDEFINITE DETENTION OF JUVENILES FOR WHOM ALTERNATIVE CUSTODIAL ARRANGEMENTS ARE AVAILABLE IS INCONSISTENT WITH SUBSTANTIVE DUE PROCESS.

Pursuant to 8 C.F.R. § 242.24, juveniles not charged with any crime but suspected of being deportable aliens may be indefinitely detained against their will in secure facilities unless INS, in its discretion, authorizes their release. Such a deprivation of physical freedom, in which every aspect of one's life is subject to control by the government, plainly implicates a liberty interest protected

by the Due Process Clause of the Fifth Amendment. As the Court observed only weeks ago, "[f]reedom from bodily restraint" lies at the "core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citation omitted).[1]

As the Court also reaffirmed in *Foucha*, once a liberty interest is established, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha*, 112 S. Ct. at 1785 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)); *see also Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972). Whether a case falls within one of the "carefully limited exceptions" to the norm of liberty depends on two related considerations. *Foucha*, 112 S. Ct. at 1787 (quoting *Salerno*, 481 U.S. at 755). First, restrictions on physical liberty, at a minimum, must serve a significant and legitimate governmental interest. Thus, for example, in *Schall*, the Court approved a brief restriction on liberty based on the "'legitimate and compelling state interest' in protecting the community from crime." *Schall v. Martin*, 467 U.S. 253, 264 (1984); *see also Salerno*, 481 U.S. at 750. Second, even where such an interest exists, the conditions of confinement must actually serve that interest. As the Court stressed in *Schall*, "the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment . . . [Rather, it is] necessary to determine whether the terms and conditions of confinement under [the statute] are in fact compatible" with the purposes allegedly served. *Schall*, 467 U.S. at 269; *see also Foucha*, 112 S. Ct. at 1781 ("[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed").

[1] The core nature of the interest in physical liberty is confirmed in other recent decisions of this Court, which also recognize that an individual's interest in liberty is "importan[t] and fundamental." *See, e.g., United States v. Salerno*, 481 U.S. 739, 750 (1987). Indeed, many other rights recognized by the Court as "fundamental" are meaningless in the absence of physical liberty. *See Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel).

Under these principles, the long-term detention of juveniles in INS detention facilities pursuant to 8 C.F.R. § 242.24 plainly violates due process. First, contrary to Petitioners' assertions, INS' policy of indefinite detention does not promote the best interests of juveniles. As the ABA Standards and the standards of numerous other organizations and entities establish, detention, far from promoting the welfare of juveniles, is presumptively injurious to it. Second, as the ABA Standards also confirm, the conditions imposed in INS detention facilities are inconsistent with INS' purported interest in advancing the welfare of juveniles. Indeed, scrutiny of the regulation and its purported justification confirms that INS' only real interest is in *avoiding* an individualized determination of the juveniles' best interests—a governmental interest that is plainly inadequate to support the challenged deprivation.

A. The Regulation Does Not Serve A Legitimate Or Significant Government Interest.

The only justification for 8 C.F.R. § 242.24 now asserted by Petitioners is an alleged concern for the welfare of juvenile detainees.[2] Pet. Br. at 23-24. While that interest is, of course, both legitimate and substantial, INS'

[2] It is undisputed that the most compelling justification for detention—the need to protect the public from crime—is absent in this case. Pet. App. at 49a. Thus, this case stands in sharp contrast to the cases principally relied upon by Petitioners, where the Court approved brief restrictions on liberty that were narrowly focused to serve the government's weighty interest in preventing crime. *See Salerno*, 481 U.S. at 749; *Schall*, 467 U.S. at 264. Similarly, it is undisputed that detention is not necessary to secure the attendance of juveniles at deportation hearings. *See* Pet. App. at 8a.

policy directly *undermines* rather than serves it.[3] Indeed, to the extent that Petitioners are contending that detention, *per se*, is in the best interests of juveniles—or even that detention is preferable to release to qualified unrelated adults or charitable organizations—the argument is absurd on its face.[4]

As the ABA Standards recognize, detention in fact is contrary to the best interests of juveniles:

> Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release.

ABA Standards, standard 3:1.[5] The policy favoring release is reflected throughout the ABA Standards, which provide for mandatory release at each successive stage

[3] Earlier in this litigation, Petitioners also attempted to justify the deprivation of liberty permitted by 8 C.F.R. § 242.24 by contending that a contrary rule might expose INS to liability in tort for harm to juveniles who were released to unrelated adults. *See* Pet. App. at 20a. Petitioners now have abandoned this claim. The evolution of INS' position, however, does suggest that INS is merely engaged in a *post hoc* attempt to find an acceptable basis for its policy in the absence of a traditionally appropriate concern such as fear of crime or escape.

[4] In their Brief, Petitioners understandably seek to avoid *any* inquiry as to whether the policy advances their purported rationale. Rather, they suggest that INS' "findings" should be essentially determinative. *See* Pet. Br. at 24. However, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), does not support the proposition that the Court should rubber-stamp choices made by the Executive Branch and accept any rationale at face value. This is particularly true where, as here, the Record demonstrates that the rationale advanced is totally at odds with the effect of the policy. This Court frequently has looked beyond the interest asserted by the government in order to ascertain whether the regulation serves that interest or some unstated, improper interest. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

[5] Portions of the ABA Standards as well as other child welfare standards referenced herein are reproduced in the Appendix.

of juvenile pre-trial proceedings unless certain findings—none of which is applicable to Respondents here—are made.[6] *See* ABA Standards, standards 5.1, 6.4, 6.6 and 7.7.

The ABA Standards are far from unique in recognizing that the welfare of juveniles cannot truly be served, as Petitioners now appear to assert, by detention in secure facilities. The United Nations Convention on the Rights of the Child, which was endorsed last year by the ABA, reached precisely the same conclusion:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

See United Nations, Convention on the Rights of the Child, Art. 37(b) (hereinafter "U.N. Convention") (*reprinted in* C. Cohen & H. Davidson, *Children's Rights in America: U.N. Convention on the Rights of the Child Compared With United States Law* (1990)).

The Department of Justice itself adopted standards in July 1980 that address the detention of juveniles. *See* United States Department of Justice, *Standards for the Administration of Juvenile Justice* (1980) (hereinafter "DOJ Standards"). Consistent with the ABA's position, the DOJ Standards recognize:

> the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a

[6] Under these standards, detention is authorized only in cases that involve an alleged criminal offense that would be a felony for an adult and where either: (1) the crime charged is a class one juvenile offense involving violence; (2) the juvenile is a fugitive from an institution; or (3) the juvenile has compiled a demonstrable record of willful failure to appear at juvenile proceedings. *See id.*, standard 6.6. None of these exceptions is applicable to Respondents here.

> secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary.

DOJ Standards, standard 3.155, commentary.

The policies reflected in the ABA Standards are also consistent with federal and state law regarding the detention of juveniles. For instance, the Juvenile Justice and Delinquency Prevention Act ties federal funding to the development of statewide programs that "increase the use of nonsecure community-based facilities and discourage the use of secure incarceration and detention." 42 U.S.C. § 5633(a)(10)(H)(iv). Similarly, in the non-criminal context, the Adoption Assistance and Child Welfare Act promotes the placement of juveniles in the "least restrictive (most family like) setting . . ."[7] 42 U.S.C. § 675(5)(A); *see also* 42 U.S.C. § 671(a)(1). In addition, a number of state legislatures have adopted release provisions comparable to those contained in the ABA Standards.[8]

INS thus stands alone in its contention that incarceration in detention facilities best serves the interests of juvenile detainees. As evidenced by the position of the ABA, other state and federal entities, as well as a uni-

[7] The ABA has endorsed the Adoption Assistance and Child Welfare Act.

[8] *See, e.g.*, Va. Code Ann. § 16.1-248.1 (child may be detained in secure facility only upon a finding that there is probable cause to believe that the child committed the act alleged and that (1) the release of the child would constitute an unreasonable danger to the person or property of others or to the child's life or health or (2) the child has threatened to abscond from the jurisdiction); Fla. Stat. § 39.002(4) ("detention . . . should be used only when less restrictive interim placement alternatives prior to adjudication and disposition are not appropriate . . . and be limited to situations where there is clear and compelling evidence that a child presents a risk of failing to appear or presents a substantial risk of inflicting bodily harm on others . . ., presents a history of committing a serious property offense prior to adjudication, disposition, or placement, or requests protection from imminent bodily harm").

form chorus of child welfare organizations, a policy resulting in the presumptive detention of juveniles plainly does not serve any legitimate interest in the welfare of children.

The facial implausibility of INS' purported justification is underscored by the conditions of confinement prevalent at the secure detention facilities operated by or for INS. As the record amply demonstrates, juveniles held in such facilities are denied all of the essential attributes of freedom. They are routinely denied any opportunity to attend school, to engage in recreational activities or to receive telephone calls or visitors. *See* Pet. App. at 32a, 139a; J.A. at 14, 26. Many have been subjected to strip searches and commingled with adults and members of the opposite sex. *See* Pet. App. at 118a; J.A. at 16, 17, 24-25; *see generally Flores v. Meese*, 942 F.2d 1352, 1367-68 (9th Cir. 1991) (Tang, J., concurring) (describing conditions of INS facilities and "adverse consequences" of detention) (Pet. App. at 32a).[9] Although Petitioners suggest—mostly from outside the Record—that conditions at INS facilities have improved,[10] there is no dispute that

[9] The ABA Standards again provide a useful reference. In contrast to INS facilities, where juveniles and adults of both sexes have been commingled, the ABA Standards provide that "[t]he interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited." ABA Standards, standard 10.2. Similarly, the ABA Standards recognize the particular importance to juvenile detainees of privacy, education, and access to visitors and telephones. *See* ABA Standards, standards 10.6-10.7. The Record demonstrates that INS detention facilities fail to satisfy any of these standards.

[10] Petitioners labor mightily to convey the impression that the juveniles' interest is of diminished significance in light of the allegedly salutary conditions in INS detention facilities. Petitioners contend that, pursuant to a 1987 consent decree between INS and Respondents (hereinafter "Detention Memorandum"), INS must "establish a network of community based shelter care programs" that "provide a safe and appropriate environment for alien minors." Pet. Br. at 11-14. Petitioners neglect to reveal, however, that the

these deplorable conditions existed at the same time that INS was asserting that it was holding juveniles in these facilities to further their welfare.

B. Administrative Convenience Is Not A Sufficient Interest To Justify The Indefinite Detention Of Juveniles For Whom Alternative Custodial Arrangements Are Available.

In short, INS cannot sustain the deprivation of liberty effected by 8 C.F.R. § 242.24 on the grounds that indefinite detention under these conditions actually promotes or even protects the welfare of detained juveniles. To do so flies in the face of common sense, the position of all recognized authorities (including the ABA Standards), and the evidence in the record concerning the actual conditions permitted at these facilities.

Accordingly, INS' blanket restriction on release, except to parents and certain others, must be recognized for what it is: a policy motivated solely by the convenience of avoiding individualized determinations as to whether release is *in fact* in the best interests of any given detained

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provisions contained in the Detention Memorandum are not mandatory. In the six years since it was executed, INS has made no effort to codify the standards prescribed in the Detention Memorandum. In fact, when it promulgated 8 C.F.R. § 242.24, INS expressly refused to incorporate any standards relating to conditions of detention. INS determined that "[s]tandards of confinement are beyond the scope of this particular rule which is limited to processing and release." 53 Fed. Reg. 17,450 (1988). Thus, INS practices in connection with the juvenile detention facilities are governed exclusively by internal policies and INS is free to revert to the practices documented in the Record at any time.

In fact, it is unclear from the Record whether any of these internal policies have been implemented by INS. Petitioners state that INS "*generally has adhered* to the policies set forth in the [Detention Memorandum] on a nationwide basis." Pet. Br. at 11 n.15 (emphasis added). However, Petitioners have not presented any evidence to support their argument that conditions have improved in INS detention facilities.

juvenile. As Petitioners themselves characterize their interest, "INS has neither the administrative resources nor the expertise to conduct the home visits necessary to make reliable guardianship determinations." Pet. Br. at 27-28.

Even accepting Petitioners' argument at face value, a lack of administrative resources does not provide a sufficient basis to justify an extended deprivation of liberty. As this Court has observed in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted):

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

In *Stanley*, the Court invalidated on due process grounds a state statute that effectively precluded an individualized determination as to whether a father was an appropriate guardian after the child's mother died. The Court noted that "[p]rocedure by presumption is always cheaper and easier than individualized determination," but found that an individualized determination was required by due process. *Id.* at 656-57. The same principle controls here.

The ABA Standards also reinforce the constitutional imperative that administrative convenience may not provide a proper basis for the detention of juveniles:

> [T]he absence of funds cannot be a justification for resources or procedures that fall below the standards or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under

> less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

ABA Standards, standard 3.6.

In short, INS cannot justify the protracted detention of juveniles on the ground that it is unwilling or unable to make an individualized determination as to whether release is appropriate.[11]

II. THE INDEFINITE DETENTION OF JUVENILES WITHOUT A ROUTINE INDIVIDUALIZED DETERMINATION OF WHETHER THEIR BEST INTERESTS ARE SERVED BY CONTINUED DETENTION VIOLATES FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS.

The cursory procedural protections afforded by 8 C.F.R. § 242.24 also are plainly insufficient to satisfy the procedural guarantees of the Due Process Clause. Under the now-familiar test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the degree of procedural protection mandated by the Fifth Amendment requires consideration of three factors: (1) the private interests involved; (2) the risk that current procedures will result in the erroneous deprivation of those interests and the probable value of additional or alternative procedural safeguards; and (3) the government's interest in maintaining current procedures. Applying these factors, due process, at a minimum, requires that INS afford juvenile detainees an individualized hearing on whether their best interests are

[11] It is noteworthy that Petitioners have submitted no evidence in support of their claim of administrative burden. In their Petition for a Writ of Certiorari, Petitioners cited a number of statistics in support of their argument that individualized review would impose a significant administrative burden on INS. *See* Petition for Writ of Certiorari at 25. Now that these statistics have been retracted, there is no factual evidence before the Court in support of Petitioners' claim of administrative burden. *See* Pet. Reply Br. at 1-2 n.1.

served by release to an unrelated adult (including any available church or charitable organization) or detention in an INS facility.

A. Juveniles Have A Significant Interest In Avoiding Detention In INS Facilities.

Under 8 C.F.R. § 242.24, juvenile detainees who present no danger to the community and no risk of flight not only are deprived of their physical freedom, but are often exposed to extraordinarily harsh conditions. *See supra* at 11-12. Thus, Petitioners do not, and could not, dispute that the private interest at issue in this case is substantial. Indeed, as discussed *supra*, freedom from detention is at the core of the liberty interests protected by the Due Process Clause. *See supra* at 6.

In addition to the substantial interest in maintaining their freedom, juveniles have an interest in enhancing their ability to consult with counsel and to prepare a defense in the deportation hearing. For those juveniles who are represented by counsel, the restrictive conditions in INS facilities effectively limit their ability to consult with him or her. As this Court has recognized, when an individual is detained, he or she is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (footnote omitted). Consistent with this observation, juveniles detained by INS are not free to leave the facility to collect necessary evidence, interview witnesses and perform the other functions necessary for the preparation of their defense. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (conditions in INS detention facilities impair access to counsel).

Moreover, detention can have the effect of diminishing the likelihood, already slim, of ever retaining counsel. Although juveniles may face torture, imprisonment or political persecution in their home country as a result of deportation, the Immigration and Naturalization Act

does not authorize the appointment of counsel at the government's expense in any deportation proceeding. *See* 8 U.S.C. § 1362. As a result, most detained aliens fail to obtain representation prior to their deportation hearing. The great majority of the juveniles in INS detention are impoverished and reside in detention facilities that are located in remote areas of the country where little, if any, free legal assistance is available. *See* Note, *INS Transfer Policy: Interference With Detained Aliens' Due Process Right To Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987).

The presence of counsel can significantly affect the outcome of a deportation proceeding. INS regulations are complicated and detainees are often undereducated and unfamiliar with either the English language or the American legal system.[12] Perhaps for that reason, an alien who receives legal representation during his or her deportation proceeding is more than three times as likely to receive asylum from an immigration judge than an unrepresented applicant. *See* General Accounting Office, *Asylum: Approval Rates for Selected Applicants*, Appendix, Table 1.1 (GAO June 1987). Based upon its study of conditions in detention facilities in south Texas, the ABA concluded that "the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled." *See* ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas* 3 (July 1989).

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[12] As this Court has noted, potential deportees constitute "a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950).

B. Existing Procedure Does Not Protect Juvenile Detainees From The Risk Of Erroneous Deprivation.

Under current INS procedures, INS fails to afford juvenile detainees any meaningful opportunity for review by a neutral third party.[13] As Petitioners themselves concede, an INS enforcement officer—in some cases the arresting officer—makes the initial detention determination when a juvenile is taken into custody. *See* 8 C.F.R. § 242.24(c).[14] Moreover, the regulation does not provide for automatic review of this initial detention decision. Rather, juveniles are afforded a hearing before an immigration judge on the detention decision only if such a hearing is requested by selecting the appropriate box on a complicated form. *See* 8 C.F.R. § 242.2(d).[15]

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[13] Petitioners suggest that juveniles are afforded elaborate procedures once they are taken into custody by INS. *See* Pet. Br. at 3-8. Petitioners fail to reveal, however, that only two of the procedures described to the Court—procedures providing for an initial detention determination and the option of a hearing before an immigration judge—are even remotely related to the detention determination. The remaining procedures relate exclusively to juveniles' option to waive their right to a due process deportation hearing and elect voluntary departure.

[14] This INS officer determines whether: (1) the juvenile is eligible for release on bond, parole or recognizance and (2) a parent, guardian or adult relative is available to take custody of the juvenile. *Id.*, § 242.24(b).

[15] Pet. Br., App. at 8a. Unlike the forms relating to voluntary deportation, this form is not in simple language that might be understood by a juvenile. In pertinent part, the form provides that:

> Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be [the form then specifies

This "option" of a custody redetermination hearing is of little practical consequence since juveniles cannot reasonably be expected to comprehend the nature of the procedure.[16] As this Court has observed in a related context, a person voluntarily committing himself or herself to a hospital "who is willing to sign forms but is incapable of making an informed decision is, by the same token, unlikely to benefit from [his or her] statutory right to request discharge." *Zinermon v. Burch*, 494 U.S. 113, 133 (1990); *see also Flores v. Meese*, 942 F.2d 1352, 1368 n.3 (9th Cir. 1991) (Tang, J., concurring) ("[n]o matter how elaborate and accurate the . . . proceedings available under the [regulation] may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first

whether the juvenile will be detained in INS custody, released on recognizance or released on bond.]

You may request the Immigration Judge to redetermine this decision.

Id.

[16] There is no indication in the Record that INS explains the consequences of electing a hearing before an immigration judge. Nor can children, who are obviously unfamiliar with the United States' legal system and administrative procedure, reasonably be expected to understand such procedures. These juveniles cannot be expected to comprehend laws that confound even the most respected federal judges. *See Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981) ("[w]hatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon"); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("[w]e have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos' labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges").

place") (quoting *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981)).

As this Court's decisions, which are echoed by the ABA Standards, make clear, these procedures create an unacceptably high risk of erroneous deprivation of the affected liberty interest. Where, as here, the core interest in freedom from restraint is involved, the Court has generally required a hearing before a neutral and detached decisionmaker. Thus, for example, in *Salerno*, the Court upheld procedures that afforded arrestees procedural protections including a "full-blown adversary hearing" in which the government was required to prove by clear and convincing evidence that no conditions of release could reasonably assure the safety of the community. Similarly, in upholding the New York statute at issue in *Schall*, the Court relied on the range of procedural protections provided to juveniles, including an individual probable cause hearing to determine whether he or she posed a threat to the community.[17] *Schall*, 467 U.S. at 262; *see also Parham v. J.R.*, 442 U.S. 584, 605 (1979) (commitment decision of parent or guardian must be reviewed by a neutral decisionmaker); *In re Gault*, 387 U.S. 1, 30 (1967) (juveniles confronted with incarceration must be afforded a hearing containing the essentials of due process and fair treatment).

The ABA Standards similarly prescribe detailed procedures governing the pre-disposition detention of juveniles. Under standard 6.5(D), the intake official is required to reach an initial status decision and determine

[17] The statute provided for a limited pre-trial detention period and an expedited fact-finding hearing. During the period of confinement, juveniles were placed in carefully regulated conditions and were provided educational and recreational opportunities. *Schall*, 467 U.S. at 262; *see also Foucha*, 112 S. Ct. at 1787 (invalidating state statute that authorized indefinite commitment because acquitee was not afforded adequate procedural protections).

whether the juvenile is eligible for release. If the intake official determines that the juvenile is subject to detention, that official must file a petition for a release hearing within twenty-four hours and the juvenile must be afforded a hearing in court within a day of the filing of such petition. *Id.*, standard 7.6. The juvenile must also be provided with notice of the hearing, the right to legal counsel and access to the information on which the judge will base his or her determination. *Id.* At the hearing, the government has the burden of demonstrating that there is probable cause to believe that the juvenile committed the offense charged. *Id.* Release is mandatory if the government fails to make a showing of probable cause or release is required under prescribed detention standards. *Id.* The court is then required to hold a detention review hearing at or before the end of each seven-day period following the initial detention hearing. *Id.*, standard 7.9.

The procedures contained in the ABA Standards are consistent with those recommended by organizations concerned with child welfare issues. Under the DOJ Standards, a juvenile taken into custody must be afforded a detention hearing before a family court judge within twenty-four hours. DOJ Standards, standard 3.155. The DOJ Standards also provide that "[u]nless the state demonstrates by clear and convincing evidence that continued secure or nonsecure detention is warranted, the court should place the juvenile in the least restrictive form of release." *Id.* Moreover, the DOJ Standards require a review hearing at or before the end of each seven-day period during which the juvenile remains in secure detention. *Id.*, standard 3.158. Similarly, the United Nations Convention on the Rights of the Child provides that:

> [e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

U.N. Convention, Art. 37(d). As all of these standards reflect, in the absence of a hearing before a neutral decisionmaker, the risk of erroneous deprivation of liberty is unacceptably high.

C. Petitioners Do Not Have A Strong Interest In Denying Juvenile Detainees An Individualized Determination Of Their Best Interests.

Petitioners have not established any substantial countervailing interest in denying juveniles automatic and individualized review. Petitioners assert in conclusory fashion that the "fiscal and administrative burdens" of an automatic hearing requirement would be substantial. *See* Pet. Br. at 37. This bald assertion is insufficient to establish a "strong interest" in present INS procedures. As discussed *supra*, there is no evidence in the Record documenting either the existence or magnitude of the claimed burden of an individualized hearing. *See, supra* at 14 n.11.

Furthermore, it is by no means obvious that an individualized hearing would impose any additional costs or administrative burdens on INS—even if such costs are assumed to be relevant to the constitutional question. INS is currently providing a hearing to juvenile detainees on an optional basis. *See* 8 C.F.R. § 242.2(d). A system of immigration judges is thus already in place. Moreover, it is at best unclear how the extension of INS' existing system of review would be more costly than the $100 per day required to house juveniles in INS facilities. Even if such burden could be documented, the magnitude of the individual's liberty interest and the risk of erroneous deprivation inherent in current procedures clearly outweigh the marginal burden of providing mandatory hearings before a neutral decisionmaker.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the *en banc* decision of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STANDARDS RELATING TO INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION

* * * *

GENERAL INTRODUCTION

The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces. These difficulties are caused or compounded by profound defects in the system of juvenile justice itself: in the inadequacy of the information and the decision-making process that leads to detention; in the delays between arrest and ultimate disposition; and in the lack of visibility and accountability that pervades the process.

In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities, and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the juvenile is innocent.

The basis of reform in this area should be a new focus on the importance and integrity of pretrial decision making, and on the development of an informed, speedy, and responsible process. Standards must be formulated and rules imposed to limit the process, to the extent possible, to performing the historic function of bail in the criminal process—ensuring the presence of the accused at future court proceedings. The standards also need to recognize and regulate candidly the function that bail in the adult

criminal process plays in fact, but declines to acknowledge in law—that some arrested persons are too obviously guilty and apparently too dangerous to others to be released by any reasonable judicial officer.

This volume proceeds on the premise that the danger of too much detention before trial or disposition currently outweighs the danger—both for juveniles and society—of too much release. As a result, the standards here seek to curtail severely—but not eliminate—the discretion to detain that presently characterizes the system. Reducing such discretion is to be accomplished by three methods: narrowing the criteria for permissible detention; reducing permissible delay in the system; and increasing accountability for and review of decisions that curtail interim liberty. The volume incorporates these features in a step-by-step description of the pretrial and predisposition process. Basic principles and general procedural standards are followed by individual sets of standards applicable to each agency and official responsible for the sequential stages of contact with the juvenile.

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3.1 Policy favoring release.

Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release.

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3.6 Availability of adequate resources.

The attainment of a fair and effective system of juvenile justice requires that every jurisdiction should, by legislation, court decision, appropriations, and methods of administration, provide services and facilities adequate to carry out the principles underlying these standards. Accordingly, the absence of funds cannot be a justification for resources or procedures that fall below the standards

or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

• • • •

5.1 Policy favoring release.

Each police department should adopt policies and issue written rules and regulations requiring release of all accused juveniles at the arrest stage pursuant to Standard 5.6A., and adherence to the guidelines specified in Standard 5.6 B. in discretionary situations. Citations should be employed to the greatest degree consistent with the policies of public safety and insuring appearance in court to release a juvenile on his or her own recognizance, or to a parent.

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6.4 Responsibility for status decision.

Once an arrested juvenile has been brought to a juvenile facility, the responsibility for maintaining or changing interim status rests entirely with the intake official, subject to review by the juvenile court. Release by the facility should be mandatory in any situation in which the arresting officer was required to release the juvenile but failed to do so.

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6.6 Guidelines for status decision.

A. Mandatory release. The intake official should release the accused juvenile unless the juvenile:

1. is charged with a crime of violence which in the case of an adult would be punishable by a sentence of one year or more, and which if proven is likely to result in commitment to a security institution, *and* one or more of the following additional factors is present:

a. the crime charged is a class one juvenile offense;

b. the juvenile is an escapee from an institution or other placement facility to which he or she was sentenced under a previous adjudication of criminal conduct;

c. the juvenile has a demonstrable recent record of willful failure to appear at juvenile proceedings, on the basis of which the official finds that no measure short of detention can be imposed to reasonably ensure appearance; or

2. has been verified to be a fugitive from another jurisdiction, an official of which has formally requested that the juvenile be placed in detention.

B. Mandatory detention. A juvenile who is excluded from mandatory release under subsection A. should not, *pro tanto*, be automatically detained. No category of alleged conduct or background in and of itself should justify a failure to exercise discretion to release.

C. Discretionary situations.

1. Release vs. detention. In every situation in which the release of an arrested juvenile is not mandatory, the intake official should first consider and determine whether the juvenile qualifies for an available diversion program or whether any form of control short of detention is available to reasonably reduce the risk of flight or misconduct. If no such measure will suffice, the official should explicitly state in writing the reasons for rejecting each of these forms of release.

2. Unconditional vs. conditional or supervised release. In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each jurisdiction should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.

3. Secure vs. nonsecure detention. Whenever an intake official determines that detention is the appropriate interim status, secure detention may be selected only if clear and convincing evidence indicates the probability of serious physical injury to others, or serious probability of flight to avoid appearance in court. Absent such evidence, the accused should be placed in appropriate form of nonsecure detention, with a foster home to be preferred over other alternatives.

* * * *

7.6 Release hearing.

A. Timing. An accused juvenile taken into custody should, unless sooner released, be accorded a hearing in court within [twenty-four hours] of the filing of the petition for a release hearing required by Standard 6.5 D. 2.

B. Notice. Actual notice of the detention review hearing should be given to the accused juvenile, the parents, and their attorneys, immediately upon an intake official's decision that the juvenile will not be released prior to the hearing.

C. Rights. An attorney for the accused juvenile should be present at the hearing in addition to the juvenile's parents if they attend. There should be a strong presumption against the validity of a waiver of any constitutional or statutory right of the juvenile, and no waiver should be valid unless made in writing by the juvenile and his or her counsel.

D. Information. At the review hearing, information relevant to the interim status of an accused juvenile, other than information bearing on the nature and circumstances of the offense charged and the weight of the evidence against the accused juvenile, need not conform to the rules pertaining to the admissibility of evidence in a court of law.

E. Disclosure. The juvenile and the attorney should have full access to all information and records upon which a judge relies in refusing to release the juvenile from detention, or in imposing conditions of supervision.

F. Probable cause. At the time of the initial detention hearing, the burden should be on the state to demonstrate that there is probable cause to believe that the juvenile committed the offense charged.

G. Notice of right to appeal. Whenever a court orders detention, or denies release upon review of an order of detention, it should simultaneously inform the juvenile, orally and in writing, of his or her rights to an automatic seven-day review under Standard 7.9 and to immediate appellate review under Standard 7.12.

7.7 Guidelines for status decisions.

A. Release alternatives. The court may release the juvenile on his or her own recognizance, on conditions, under supervision, including release on a temporary, nonovernight basis to the attorney if so requested for the purpose of preparing the case, or into a diversion program.

B. Mandatory release. Release by the court should be mandatory when the state fails to establish probable cause to believe the juvenile committed the offense charged or in any situation in which the arresting officer or intake official was required to release the juvenile but failed to do so, unless the court is in possession of additional information which justifies detention under these standards.

C. Discretionary situations. In all other cases, the court should review all factors that officials earlier in the process were required by these standards to have considered. The court should review with particularity the adequacy of the reasons for detention recorded by the police and the intake official.

D. Written reasons. A written statement of the findings of facts and reasons why no measure short of detention would suffice should be made part of the order and filed immediately after the hearing by any judge who declines to release an accused juvenile from detention. An order continuing the juvenile in detention should be construed as authorizing nonsecure detention only, unless it contains an express direction to the contrary, supported by reasons. If the court orders release under a form of control to which the juvenile objects, the court should upon request by the attorney for the juvenile, record the facts and reasons why unconditional release was denied.

* * * *

7.9 Continuing detention review.

A. The court should hold a detention review hearing at or before the end of each seven-day period in which a juvenile remains in interim detention. At the first detention review hearing after the expiration of the time prescribed for execution of the dispositional order, the judge must execute such order forthwith, or fully explain on the record the reasons for the delay, or release the juvenile.

B. A list of all juveniles held in any form of interim detention, together with the length of such detention and the reasons for detention, should be prepared by the intake official and presented weekly to the presiding judge. Such reports, with names deleted, should simultaneously be made public to describe the number, duration, and reasons for interim detention of juveniles.

* * * *

10.2 Use of adult jails prohibited.

The interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited.

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10.6 Education.

All accused juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs, including an educational program for "exceptional children."

10.7 Rights of juveniles in detention.

Each juvenile held in interim detention should have the following rights, among others:

A. Privacy. A right to individual privacy should be honored in each institution. Because different children will desire different settings, and will often change their minds, substantial allowance should be made for individual choice, and for private as well as community areas, with due regard for the safety of others.

B. Attorneys. A private area within each facility should be available for conferences between the juvenile and his or her attorney at any time between 9 a.m. and 9 p.m. daily.

C. Visitors. Private areas within each facility should be available as contact visiting areas. The period for visiting, although subject to reasonable regulation by the facility staff, should cover at least eight hours every day of the week, and should conform to school regulations when the juvenile is attending school outside the facility. All regulations concerning visitors and visiting hours should be subject to review by the juvenile court.

D. Telephone. Each juvenile in detention should have ready access to a telephone betwen 9 a.m. and 9 p.m. daily. Calls may be limited in duration, but not in content nor as to parties who may be contacted, except as otherwise specifically directed by the court. Local calls should be permitted at the expense of the institution, but should under no circumstances be monitored. Long distance calls in reasonable number may be made to a parent or attorney at the expense of the institution, and to others, collect.

E. Restrictions on force. Reasonable force should only be used to restrain a juvenile who demonstrates by observed behavior that he or she is a danger to himself or herself or to others, or who attempts to escape. All circumstances concerning any use of force or unusual restrictions, including the circumstances that gave rise to such use, should be reported immediately to the juvenile facility administrator and the juvenile's attorney and parent.

F. Mail. Mail from or to an accused juvenile should not be opened by authorities. If reasonable grounds exist to believe that mail may contain contraband, it should be examined only in the presence of the juvenile.

* * * *

UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD

* * * *

ARTICLE 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below 18 years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a masure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

* * * *

U.S. DEPARTMENT OF JUSTICE STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE

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3.155 Initial Review of Detention Decisions

Upon determining that the subject of a delinquency complaint should be detained, the intake officer should file a written notice with the family court together with a copy of the complaint. The notice should specify the terms of detention, the basis for imposing such terms, and the less restrictive alternatives, if any, that may be available. A copy of the notice should be given to the family court section of the prosecutor's office, the juvenile, and the juvenile's attorney and parents, guardian, or primary caretaker.

Unless the juvenile is released earlier, a detention hearing should be held before a family court judge no more than twenty-four hours after the juvenile has been taken into custody. At that hearing, the state should be required to establish that there is probable cause to believe that a delinquent offense was committed and that the accused juvenile committed it. If probable cause is established, the court should review the necessity for continued detention. Unless the state demonstrates by clear and convincing evidence that continued secure or nonsecure detention is warranted, the court should place the juvenile in the least restrictive form of release consistent with the purposes and factors set forth in Standard 3.151.

At the inception of the detention hearing, the judge should assure that the juvenile understands his/her right to counsel, should appoint an attorney to represent the juvenile if the juvenile is not already represented by counsel, and meets the eligibility requirements set forth in Standard 3.132.

If detention is continued, the family court judge should explain, on the record, the terms of detention and the reasons for rejecting less restrictive alternatives. If the

terms differ from those imposed by the intake officer, a written copy of those terms should be given to the juvenile and the juvenile's attorney and parents, guardian, or custodian.

No detention decision should be made on the basis of a fact or opinion that has not been disclosed to counsel for the state and for the juvenile.

The same procedures and time limits should apply to the matters under the jurisdiction of the family court over noncriminal misbehavior, except that the terms of detention in noncriminal misbehavior cases should be assessed against the criteria set forth in Standard 3.153.

Sources

See generally National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 12.11 (1976) [hereinafter cited as *Report of the Task Force*]; *see also* Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, *Standards Relating to Interim Status*, Standards 4.3 and 7.7-7.8, and *Standards Relating to Dispositional Procedures*, Standard 2.4(a) (tentative draft, 1977) [hereinafter cited as IJA/ABA, *Interim Status* and IJA/ABA, *Dispositional Procedures*, respectively].

Commentary

This standard recommends that the decision to detain the subject of a complaint filed pursuant to the jurisdiction of the family court over delinquency and noncriminal misbehavior should be judicially reviewed within twenty-four hours of the time at which the subject of the complaint was taken into custody. It recommends further that this review take place during a hearing at which the detained person is entitled to counsel and at which the state is required to prove that there is probable cause to believe the allegations in the complaint are true.

All of the recent national standards-setting or model legislative efforts recommend that there be an opportunity for judicial review of detention decisions. U.S. Department of Health, Education and Welfare, the *Model Act for Family Courts*, Section 23 (1975); the *Uniform Juvenile Court Act*, Section 17 (National Conference of Commissioners for Uniform State Laws, 1968); the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime*, 37 (1967); and the National Advisory Committee on Criminal Justice Standards and Goals, *Courts*, Section 14.2 (1973), as well as the IJA/ABA, *Interim Status*, *supra*, and the *Report of the Task Force*, *supra*, recommend that such hearings be mandatory. Most states provide for, and many require, a detention hearing.

Provisions regarding the time period in which such hearings should be held vary. All but one of the groups recommending a mandatory detention hearing propose that such hearings be held within forty-eight hours of arrest. The *Uniform Juvenile Court Act*, *supra*, sets a 72-hour limit. State provisions range from no specifications as to time, to the requirements in at least two jurisdictions that detention hearings be held within twenty-four hours.

Determining what time limit should be applied involves balancing two sets of competing interests. On the one hand, the intake officer needs time to gather the information necessary to make the intake and detention decisions and to prepare the necessary paper work, *see* Standards 3.143, 3.144, and 3.151, and the family court section of the prosecutor's office must have some opportunity to prepare the evidence and contact the witnesses for the probable cause determination at the detention hearing. On the other hand, there is the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such deten-

tion is necessary. Although it is recognized that the 24-hour period (including holidays and weekends) proposed in this standard will cause some difficulty in those few cases in which it is necessary to detain a juvenile, especially in rural areas, the cost of detention both to the juvenile and the taxpayers warrants such a stringent prescription.

Procedurally, the standard proposes that intake officers prepare a notice as soon as possible after making the decision to detain that explains the restraints imposed, the less restrictive alternatives that were rejected, and the reasons for rejecting them. This explanation should be in terms of the purposes and criteria set forth in Standard 3.151. Together with the similar explanation to be provided by the judge in the event detention is continued, it is part of the effort throughout these standards to make discretionary decisions more consistent and open to review. *See, e.g.*, Standards 2.242-2.245, 2.342-2.343, 3.143-3.145, 3.182-3.184, 3.188, 4.54, 4.71-4.73 and 4.81-4.82. The notice, together with a copy of the complaint, is to be filed with the family court in order to provide a basis for the hearing and given to the parties in order to provide each side at least some opportunity to prepare. This procedure is comparable to that recommended by the IJA/ABA, *Interim Status, supra.*

As noted earlier, the standard recommends that the judge must find that there is a legally sufficient basis on which to hold the juvenile before reviewing whether detention is necessary. This is consistent with the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975). Unlike the Task Force provision, the standard does not bar the use of hearsay to show probable cause. This follows the majority view in *Gerstein* that the full panoply of adversary procedures need not apply to most probable cause determinations. Moreover, given the brief time available, it would be impractical to require the state to present a full slate of witnesses. However, the standard, together with Standard 3.171, goes beyond

Gerstein in recommending that the subject of the delinquency or noncriminal misbehavior complaint be afforded the right to counsel, to be present at the detention hearing, to present evidence, and to call and cross-examine witnesses. Although these procedures do "freight" juvenile proceedings with "trial-type procedures," *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976), the significance of the detention decision for the juvenile makes such safeguards essential. The opportunity for a probable cause determination for juveniles not held in custody is recommended in Standard 3.165.

The standard provides further that no information relied upon in deciding whether detention is to be continued should be withheld from the attorney for the state, the attorney for the juvenile, and in noncriminal misbehavior proceedings the attorney for the juvenile's parents, guardian, or primary caretaker. *See* Standards 3.131-3.133. This is in keeping with the recommendations for broad disclosure by all participants of the proceedings throughout these standards. *See* Standards 3.167 and 3.187. Whether potentially harmful information should be revealed to the juvenile or the juvenile's parents or parental surrogate, is left to the discretion of counsel.

The procedures for review of decisions to place juveniles alleged to have been neglected or abused in emergency custody are discussed in Standard 3.157.

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3.158 Review, Modification, and Appeal of Detention and Emergency Custody Decisions

A review hearing should be held at or before the end of each seven-day period in which a person subject to the jurisdiction of the family court over delinquency or noncriminal misbehavior remains in secure or nonsecure detention, or whenever new circumstances warrant an earlier review.

In accordance with a specific order of the family court, an intake officer may at any time relax conditions of release, which the court has approved or imposed, if the restrictions are no longer necessary. A notice stating the changed circumstances and the new conditions should be filed with the court and a copy sent to the juvenile, the juvenile's attorney, and parents, guardian, or primary caretaker, and to the family court section of the prosecutor's office.

Secure or nonsecure detention or more stringent conditions should be imposed only by the family court following a hearing at which the circumstances justifying the additional restrictions, including a willful violation of the conditions of release or a willful failure to appear, are demonstrated by clear and convincing evidence. The decision to impose additional restrictions should be made in accordance with the criteria set forth in Standards 3.151 and 3.152 for delinquency cases and Standard 3.153 for noncriminal misbehavior cases, and in the same manner as in Standard 3.155.

The subject of a complaint or petition should be entitled to appeal an order of the family court imposing or denying release from detention, or other significant restraint on liberty. The notice of appeal should include a copy of the order and of the reasons for that order given by the family court. Appeals from detention orders should be heard and decided as expeditiously as possible.

The same review, modification, and appellate procedures should apply to neglect and abuse proceedings in which the juvenile has been placed in emergency custody, and the same modification and appellate procedures should be applicable to neglect and abuse proceedings in which conditions designed to protect the juvenile have been imposed on the juvenile's parents, guardian, or primary caretaker.

Sources:

See generally Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, *Standards Relating to Interim Status*, Standards 4.5, 7.10, 7.12, and 7.13 (tentative draft, 1977) [hereinafter cited at IJA/ABA, *Interim Status*]; National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, Standard 12.11 (1976) [hereinafter cited as *Report of the Task Force*].

Commentary

In keeping with the concern over the impact of long-term detention or emergency custody of juveniles, this standard provides for recurring review of such detention or custody. The review is intended to assure that detention or emergency custody is still warranted and to encourage prompt adjudication.

The standard requires a judicial review hearing every seven days or whenever new circumstances arise. This combines the short time period recommended by the IJA/ABA Joint Commission with the more flexible criterion proposed by the *Report of the Task Force*, *supra*; IJA/ABA, *Interim Status*, *supra*; Standard 7.10; *Report of the Task Force*, *supra*. The Wisconsin Council on Criminal Justice, Special Study Committee on Criminal Justice Standards and Goals, *Juvenile Justice Standards and Goals*, Section 7.3 *et seq.* (1975) urges that detention in delinquency cases be reviewed every five days.

The second paragraph of the standard is to encourage family court judges to identify the circumstances in which the intake officer may terminate the detention or emergency custody or may ease or void the conditions. Intake officers are not provided the power to relax the conditions of detention or release without judicial approval. However, intake officers should be authorized to seek such approval when the situation warrants.

Imposition of more stringent conditions on release or, in neglect and abuse matters, on continued parental custody of the child require a court order so as to assure that the added restraints are warranted. One of the circumstances justifying a tightening of the conditions of release or placing the juvenile in more restrictive detention is a willful violation of the conditions of release.

Finally, the standard provides for interlocutory appeal of decisions approving or imposing detention, emergency custody, or other significant restraints on liberty. Such appeals should be processed and decided as expeditiously as possible. It is anticipated that many appeals of detention decisions will be heard by a single appellate court judge. The provisions approved by the IJA/ABA, *Interim Status*, *supra* recommend that appeals of detention decisions be heard within twenty-four hours of the filing of the notice of appeal and decided at the conclusion of appellate argument. IJA/ABA, *Interim Status*, *supra* at Standard 7.12.

AMERICAN IMMIGRATION LAWYERS ASSOCIATION REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association express support for improving the asylum process and facilitating exercise of the right to counsel consistent with INA sec 292 as amended by calling upon the Immigration and Naturalization Service and the Executive Office of Immigration Review to implement the July 1989 recommendations of the ABA Coordinating Committee on Immigration Law, including:

a. Facilitating effective access by asylum applicants in exclusion and deportation proceedings to legal representation, improving physical and telephonic access between detained asylum seekers and legal representatives, disseminating accurate lists of legal service providers, permitting legal service organizations to provide general orientation programs and distribute informational and legal materials to detained persons.

b. Providing complete and accurate interpretation of all immigration court proceedings, including all testimony, and allowing for unrepresented applicants to submit asylum applications in a language other than English.

c. Detaining asylum seekers only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings. The INS should explore alternative means of ensuring appearance at court proceedings, such as supervised conditional pretrial release. Bond, when imposed, should be based upon the applicant's economic means and the likelihood of absconding, and work authorization should be granted during the entire course of the application process. Counsel should be permitted to enter limited appearances for bond and custody proceedings.

BE IT FURTHER RESOLVED, That the American Bar Association support a humane and enforceable safe

haven mechanism to provide protection to persons who are unable to return to their home countries due to conditions that endanger their safety and well-being; and that nationals of the People's Republic of China, El Salvador, and Nicaragua should be among the first beneficiaries of the aforementioned protections.

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REPORT

ASYLUM.

I. *General.*

The Refugee Act of 1980 established for the first time a statutory basis for individuals fleeing persecution in their homelands to obtain asylum in the United States. Derived from the United Nations Protocol Relating to the Status of Refugees, to which the U.S. acceded in 1968, the Refugee Act was principally intended to bring U.S. refugee law into conformity with international standards by establishing uniform asylum procedures and eliminating the ideological considerations that had dominated prior refugee determinations. S. Rep. No. 256, 96th Cong., Sess. 4, at 1-2, reprinted in *U.S. Code Cong. and Admin. News* 149 (1980).

The law permits the Attorney General to grant asylum to an alien in the United States, irrespective of his or her immigration status, who can demonstrate that he or she is a "refugee." *i.e.*,

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Each word and phrase of the definition of "refugee" has legal significance which has been analyzed both in U.S. Courts and in 1979 Handbook of the United Nations High Commissioner for Refugees, which was prepared to guide nations in construing the obligations contained in the U.N. Protocol. Every asylum petitioner in the U.S. is the subject of a complex legal determination, based upon this definition, which the Attorney General has delegated to the INS and immigration judges.

Persons entitled to asylum may face torture, imprisonment, or death as a result of an erroneous denial of their asylum. Special linguistic, cultural, and psychological disabilities often make it extremely difficult for refugees to clearly articulate their experiences or freely discuss their views, particularly with government officials. Constitutional standards of due process, therefore, mandate a broad range of procedural safeguards to ensure an appropriate asylum determination. For applicants who lack knowledge of our language and legal system, full and effective representation by counsel is one of the most important means by which to ensure a fair and accurate determination.

The role of lawyer, or qualified legal representative, in an asylum case is to prepare the asylum application, identify witnesses and gather supporting documentary evidence, help the applicant to identify clearly the relevant facts of his or her case and to describe effectively the situation that engenders the fear of persecution. While valuable for all applicants, this assistance is indispensable for applicants who are detained and have no access to sources of evidence that are necessary to meet their burden of proof. Unlike a defendant in a criminal proceeding, however, an asylum applicant's right to counsel in immigration proceedings must be at "no expense to the government."

Representation by counsel appears to be a significant factor in the outcome of the asylum determination. A General Accounting Office report has calculated that applicants who have legal representation are more than twice as likely as unrepresented applicants to be granted asylum by the INS district directors in a nonadversarial process, and more than three times as likely to receive asylum from immigration judges in adversarial proceedings. See *Asylum: Approval Rates for Selected Applicants* (June 1987), Appendix Table 1.1. While these figures suggest that the asylum system must be improved for applicants who appear without counsel, they demonstrate that, under the present system, the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled.

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